

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between:

**FRATERNAL ORDER OF POLICE,
LODGE #5**

and

CITY OF PHILADELPHIA

**AAA Case #01-15-0006-0300
(Gr: P/O Winckler Discharge)**

Walt De Treux, Esq., Arbitrator

Hearing Date: 11/29/16

Decision Date: 12/30/16

Appearances: For the FOP – Marc L. Gelman, Esq., *JENNINGS SIGMOND*
For the City – Benjamin Patchen, Esq., *ASST. CITY SOLICITOR*

Introduction and Statement of Relevant Facts

Officer Tyrone Winckler has been a City of Philadelphia police officer since September 1990. On November 2, 2013, Officer Winckler, in off-duty status, was leaving a friend's house when he encountered D■■■■ H■■■■ outside the residence. H■■■■ questioned the Grievant about an expensive pair of glasses he was wearing. H■■■■ asked to see the glasses; and when Officer Winkler refused, H■■■■ said he would just take the glasses. Officer Winkler and H■■■■ engaged in a physical altercation, which was broken up by Philadelphia police officers who had blanketed the neighborhood in search of suspects in a home invasion. After speaking to the combatants and determining that H■■■■ has no wants or warrant, the officers instructed the Grievant and H■■■■ to "go home."

H■■■■ walked past Grievant's car, writing down his license plate number. As he proceeded up the street, Officer Winckler observed a "gold, shiny object" in the

pocket of H■■■■'s hoodie. Grievant followed H■■■■ around the corner, reportedly to alert the many police officers on the same street that H■■■■ may have a weapon. As Officer Winkler came closer to H■■■■, H■■■■ questioned whether Grievant was following him. H■■■■ reached into his pocket, pulling out brass knuckles. The two men lunged at each other and became involved in another physical altercation. After getting struck twice in the face as they wrestled, Officer Winkler pulled his personal firearm. H■■■■ grabbed the weapon with both hands over Grievant's hand. During the scuffle, the weapon discharged. Nearby police officers responded within seconds and subdued both H■■■■ and Officer Winkler. Once subdued, the responding officers learned that Grievant was a member of the force.

That same night, Lt. David Van, a now retired member of Internal Affairs, investigated the weapon discharge. After investigation, Internal Affairs submitted a report to the Commissioner, recommending that the matter be submitted to the Firearms Discharge Review Board (a/k/a the Use of Force Review Board).

On December 21, 2014, prior to the completion of the investigation, Officer Winckler was terminated for an unrelated incident. He grieved that termination. The Review Board continued with its evaluation of the November 2013 shooting incident.

On May 5, 2015, the Review Board found that Officer Winckler "did not discharge firearm according to departmental policy." It recommended that Officer Winckler be dismissed from employment if returned to work from the December 2014 termination.

On August 27, 2015, the FOP and the City reached a settlement in the grievance contesting the December 2014 termination. Pursuant to the settlement, Officer Winckler was returned to work on October 20, 2015.

On October 23, 2015, the Commissioner suspended Officer Winckler for 30 days with the intent to dismiss in response to the November 2013 shooting incident. Grievant was charged with Conduct Unbecoming (more specifically, lying during the internal investigation) and “[d]ischarging, using, displaying or improper handling of a firearm while not in accordance to Departmental Policy.” The Notice of Intention To Dismiss was served on Grievant on November 9, 2015.

Officer Winckler timely grieved his termination. The parties were unable to resolve the grievance through the contractual steps, and the matter was referred to arbitration. On November 29, 2016, a hearing was held at the offices of the American Arbitration Association in Philadelphia, Pennsylvania, during which time both parties had a full and fair opportunity to present documentary and other evidence, examine and cross-examine witnesses, and offer argument in support of their respective positions. The parties closed their presentation with oral argument, and the matter was submitted to the Arbitrator for a decision.

Issue

The parties stipulated to the following issue,

Did the City of Philadelphia have just cause to discharge Officer Tyrone Winckler? If not, what shall be the remedy?

Relevant Department Policies

DIRECTIVE 10-1 DISCHARGE OF FIREARMS BY POLICE PERSONNEL

II. POLICY

- A. Members of this department will exhaust all reasonable means of apprehension and control before resorting to the use of deadly force. Deadly force will be used only as a last resort to protect life consistent with department policy and the law. It is the policy of this department that members will not unnecessarily or unreasonably endanger themselves in applying these guidelines to actual situations.

- F. Police officers shall ensure their actions do not precipitate the use of deadly force by placing themselves or others in jeopardy by taking unnecessary, overly aggressive, or improper actions.

DIRECTIVE 10-10 OFF-DUTY POLICE ACTIONS

1. POLICY

- A. The safety of sworn members and others in the immediate area shall be the paramount concern when deciding to take any off-duty police action. Also, any action taken off-duty must always be consistent with Federal and State law and Department policies and procedures...
- B. ...sworn members shall not take any off-duty police action in any minor family or neighborhood disputes, summary offenses or traffic violations, unless such action is necessary to prevent bodily injury, serious bodily injury or death. Sworn members shall call Emergency 9-1-1 in these situations.

Analysis and Decision

Officer Winckler was terminated by Commissioner's Direct Action after recommendation from the Firearms Discharge Review Board. Deputy Commissioner Denise Turpin sat as a member of the Review Board and testified at length on the reasons termination was appropriate in the present case.¹ Deputy Commissioner Turpin explained that off-duty police officers should not place themselves in a position of danger absent a threat of bodily injury or death. She noted that Grievant followed H [REDACTED] up and across the street and back again instead of proceeding directly to the nearby police officers to inform them that H [REDACTED] may have a weapon. She also cited Grievant's failure to immediately identify himself as a police officer to the officers responding to the firearm discharge². She explained that his hesitancy in making known his identity created a risk of "friendly fire" from the responding officers. She further explained that the discharge of Grievant's firearm was not improper in and of itself, but would not have happened if he had went to the nearby officers instead of following H [REDACTED].

Deputy Commissioner Turpin's testimony was straightforward and unequivocal. She explained the reasons for the termination and definitively stated that the Board considered Grievant's action a violation of Directive 10-10, the Department Policy regarding Off-Duty Police Actions. She added that Grievant's

¹ Commissioner Charles Ramsey discharged Officer Winckler. Commissioner Ramsey left office prior to the arbitration hearing. The parties stipulated that had he (or the current Commissioner) testified, that testimony would be consistent with Deputy Commissioner Turpin's testimony.

² Officer Winckler testified that he had tried to identify himself as the responding officers restrained him, but two of those officers testified credibly that they were unaware Grievant was a police officer until after he had been subdued.

poor prior disciplinary record “did not matter” in the Review Board’s deliberations because the Review Board only had information related to the shooting incident, not any prior discipline.

Although the Review Board considered Grievant’s action a violation of Directive 10-10, the Department did not charge him with a violation of Directive 10-10. Rather, it charged him with Conduct Unbecoming, i.e., lying during the investigation³, and a violation of Directive 10-1, Discharge of Firearms by Police Personnel. It cited in the charging documents and argued at hearing that Officer Winckler’s actions violated the provision that prohibits “[d]ischarging, using, displaying, or improperly handling a firearm while not in accordance to Departmental Policy.”

The Grievant and the FOP were properly notified that Officer Winckler was charged with lying and violating Directive 10-1. They received no notice that Grievant was determined to have violated Directive 10-10 and that the violation was the basis for his termination. The City is, in effect, asking this Arbitrator to uphold Grievant’s termination on a charge that it did not raise until the date of hearing. The City charged Officer Winckler with violation of Directive 10-1, but its primary witness testified unequivocally that the Review Board considered his actions a violation of Directive 10-10. It is a fundamental tenet of due process and just cause

³ At hearing, the City produced no evidence to support the charge of lying during the investigation. Lt. Van, the Internal Affairs investigator, testified that he made no determination as to credibility in his report. He noted some discrepancies in Grievant’s interview as compared to H[REDACTED]’s interview regarding their exchange over the expensive glasses. He also explained that Grievant had stated he did not call 911 because his phone dead in his car, but noted that the phone was found near the site of the physical altercation. Neither of these statements indicates that Grievant was deliberately lying during the investigatory interview.

that an employee receive notice of the precise charges for which he is being disciplined. The City, having charged Officer Winckler with a violation of Directive 10-1, cannot, at hearing, argue that his termination should be upheld because his actions violated Directive 10-10. The City's case must rise or fall on whether Officer Winkler violated Directive 10-1, the policy under which he was charged. But the Review Board did not base its recommendation on Directive 10-1; and, Deputy Commissioner Turpin, while acknowledging on redirect examination that Directive 10-1 could apply, clearly stated that the discharge of Grievant's firearm was not improper in and of itself. The Review Board's issue with the weapon discharge was that it would not have happened had but for Officer Winckler following H [REDACTED], illustrating again that the reason for discharge related to his off-duty police action (Directive 10-10), not the discharge of the firearm (Directive 10-1).

Whether or not Grievant's action were in violation of Directive 10-10 need not be determined because he was not charged with a violation of Directive 10-10. The City cannot add or modify the charges against Grievant at hearing when the additional or new charge was not cited in the charging documents as the reason for termination.

The City violated Officer Winckler's due process rights by attempting to support Grievant's termination by relying at hearing on an alleged violation of a Directive with which he was not charged at the time of his termination. Discharge under those circumstances does not meet the just cause standard.

For these reasons, I find that the City did not have just cause to discharge Officer Tyrone Winckler.

Award and Remedy

The grievance is sustained. As remedy, the City is directed to remove the discharge from Officer Winckler's record; to reinstate the Grievant as soon as practicable after issuance of this Award to his former position with no loss of seniority, provided he meet all Department pre-hire requirements; and to make Grievant whole for any losses incurred as a result of his discharge, including but not limited to back pay and benefits for the period from the date of his suspension with intent to dismiss to the date of his reinstatement, less interim earnings.

The Arbitrator shall retain jurisdiction of the case for the sole purpose of resolving any issues over implementation of the remedy.

A handwritten signature in black ink, appearing to read 'WALT DE TREUX', written over a horizontal line.

WALT De TREUX